



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *R. G. v. Minister of Employment and Social Development*, 2018 SST 148

Tribunal File Number: AD-17-649

BETWEEN:

R. G.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: February 13, 2018

DECISION AND REASONS

DECISION

[1] The appeal is allowed and the matter is referred back to the General Division for reconsideration.

OVERVIEW

[2] R. G. (Claimant) finished high school in India before moving to Canada. In Canada she did not obtain any English language or other formal education. The Claimant worked in a factory until she was injured in a car accident. She applied for a Canada Pension Plan (CPP) disability pension and claimed that she was disabled by resulting injuries, including ongoing head, neck and shoulder pain, and mental illness. The Minister of Employment and Social Development refused the application. The Claimant appealed this decision to the Tribunal. The Tribunal's General Division dismissed her appeal. The Claimant's appeal to the Tribunal's Appeal Division is allowed because the General Division based its decision on an erroneous finding of fact under the *Department of Employment and Social Development Act* (DESD Act).

PRELIMINARY MATTER: THE APPEAL IS DECIDED ON THE WRITTEN RECORD

- [3] The appeal was decided on the basis of the written record after considering the following:
- a) The *Social Security Tribunal Regulations* require that appeals be conducted as quickly as the circumstances and the considerations of fairness and natural justice permit.¹
 - b) Both parties filed detailed written submissions on the legal issues to be decided.
 - c) Neither party requested an oral hearing.

¹ Section 3 of the *Social Security Tribunal Regulations*.

ISSUES

[4] Did the General Division make an error in one of the following ways such that the Appeal Division should intervene?

- a) By failing to consider whether the Claimant could regularly pursue any substantially gainful occupation;
- b) By failing to consider evidence from Dr. Sharma² or Dr. Sullivan³ and not giving adequate weight to evidence of her mental illness;
- c) By relying on the Claimant's failure to have her impairments categorized as catastrophic in the car insurance context; or
- d) By failing to consider the Claimant's personal circumstances, including her education and work history.

ANALYSIS

[5] The DESD Act governs the Tribunal's operation. It provides for only three, narrow grounds of appeal that can be considered. They are that the General Division failed to observe the principles of natural justice or made a jurisdictional error, made an error of law, or based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.⁴ The issues in this appeal must be considered in this context.

Did the General Division Fail to Consider if the Claimant Could Work Regularly?

[6] For a claimant to be disabled under the CPP, they must prove that they have a disability that is both severe and prolonged. A claimant has a severe disability if he or she is incapable

² Reports dated November 29, 2014, and March 10, 2017.

³ Report dated March 20, 2015.

⁴ Subsection 58(1) of the DESD Act.

regularly of pursuing any substantially gainful occupation.⁵ Each word in this definition must be given meaning.⁶ The Claimant argues that the General Division erred in law because it failed to consider whether she would be able to return to work regularly. The Tribunal member is presumed to know the legal test that a claimant must meet, and to apply that test to the facts to reach a decision. The decision does not specifically consider the issue of regularity. However, this was not presented as an issue to the General Division. There is no indication that the Claimant's condition waxes and wanes, or presents inconsistently such that her capacity varies significantly from one day to the next. Accordingly, the General Division did not err by not specifically analyzing this issue in the context of the facts before it.

Did the General Division Fail to Consider the Claimant's Medical Evidence and Mental Illness?

[7] The Claimant also argues that the General Division erred because it failed to consider all of the evidence before it, particularly reports from Dr. Sharma and Dr. Sullivan. The General Division is presumed to have considered all of the evidence before it, and need not set out in detail each and every piece of evidence that was presented.⁷ However, a finding that the General Division based its decision on an erroneous finding of fact under the DESD Act can be inferred from a failure to specifically mention and analyze important information. When a decision-maker fails to mention important evidence that points to a conclusion opposite to their decision, it is possible to infer that this contradictory evidence was overlooked.⁸ The General Division decision refers to one report by Dr. Sharma⁹ and to Dr. Sullivan's report¹⁰ including recommendations for further treatment. The decision did not, however, refer to Dr. Sharma's later report that stated clearly that the Claimant could not work,¹¹ nor to any evidence regarding her aggression.

[8] The General Division decided that "there are no medical reports stating that the Appellant has reached maximum recovery or that her prognosis is poor and there is no medical

⁵ Paragraph 42(2)(a) of the CPP.

⁶ *Villani v. Canada (Attorney General)*, 2001 FCA 248.

⁷ *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

⁸ *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC).

⁹ Paragraph 17 of the decision.

¹⁰ Paragraph 18 of the decision.

¹¹ March 10, 2017.

evidence to support that she suffers from severe medical or psychological issues affecting her ability to return to the workforce in a suitable capacity on or prior to her [minimum qualifying period (MQP)].”¹² This is an erroneous finding of fact. Although no medical report penned prior to the MQP (the date by which a claimant must be found to be disabled to be eligible to receive the disability pension) stated that the Claimant had a severe condition, Dr. Sharma’s 2017 report, which was based on continued treatment of conditions that arose prior to the MQP, stated that the Claimant was not able to work, and had a poor, or at best guarded, prognosis. There was no indication that the Claimant had different medical conditions than she did prior to the MQP, or that her condition had deteriorated due to a specific circumstance. Therefore, Dr. Sharma’s 2017 report was important evidence. It was contradictory to the conclusion the General Division reached. I am satisfied that the General Division based its decision on this erroneous finding of fact that was made without regard to all of the material that was before it. The appeal must be allowed on this basis.

[9] I am also satisfied that although the General Division noted some of the Claimant’s symptoms of mental illness, it failed to consider the impact this condition had on her capacity regularly to pursue any substantially gainful occupation. For example, the decision neglects to consider that the client has aggression that she cannot control, directed mostly at family members, or what impact her daily napping would have on her capacity to work.

[10] Finally on this, I am satisfied that the statement that the Claimant did not appear to be under the regular care of a mental health professional for her emotional issues¹³ was erroneous as she was treated by Dr. Sharma for at least two years.

¹² Paragraph 30 of the decision.

¹³ Paragraph 34 of the decision.

Did the General Division Rely on the Insurance Categorization of Her Condition?

[11] The General Division decision reports that the Claimant's catastrophic impairment claim, made in the context of her car insurance claim, was denied.¹⁴ The decision specifically states that this decision was made after the MQP. The decision was not based on this fact. The General Division did not err by referring to it.

Did the General Division Consider the Claimant's Personal Circumstances?

[12] The Federal Court of Appeal instructs that when deciding whether a claimant is disabled, their personal circumstances, including age, education, language skills, work and life experience must be considered.¹⁵ The Claimant argues that the General Division erred when it failed to consider that she did not have a Canadian high school education. The decision states that the Claimant could improve her English language skills by attending classes, which would result in her being able to retrain and return to the workforce.¹⁶ It based this conclusion on the facts that she was relatively young, taught herself some English and was able to find work when she moved to Canada. While this portion of the decision does not refer specifically to the Claimant's physical and emotional limitations, when read in the context of the whole decision, I am satisfied that the General Division considered her personal circumstances. The Claimant's disagreement with this statement in the decision does not establish that it is an erroneous finding of fact under the DESD Act.

[13] The Claimant also argues that the General Division should have given weight to her long work history, and inferred from this that she would have returned to work if she could have. The decision sets out that she worked in a factory for approximately 18 years. It reached no conclusion based on this fact. I am not satisfied that its failure to do so was an error.

CONCLUSION

[14] The appeal is allowed because the General Division based its decision on an erroneous finding of fact made without regard to all of the material that was before it. Since evidence will

¹⁴ Paragraph 32 of the decision.

¹⁵ *Villani v. Canada (Attorney General)*, 2001 FCA 248.

¹⁶ Paragraph 37 of the decision.

have to be considered and weighed, this matter is referred back to the General Division for reconsideration.

Valerie Hazlett Parker
Member, Appeal Division

METHOD OF PROCEEDING:	On the written record
APPEARANCES:	Baldeep Virk, Counsel for the Appellant Penny Brady, Counsel for the Respondent